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Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Respondent,*

v.

MARTIN KUPER,

*Petitioner.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

I. SHOULD A CRIMINAL DEFENDANT BE ALLOWED TO APPEAL THE GRANT OF HIS PRETRIAL MOTION TO DISMISS THE INDICTMENT WITHOUT PREJUDICE UNDER THE COLLATERAL ORDER DOCTRINE?

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## OPINIONS BELOW

See attached exhibits from United States District Court for the Eastern District of Pennsylvania (Exhibit "E") and decision of the United States Court of Appeals for the Third Circuit (Exhibit "G").

## JURISDICTION

This Court has jurisdiction to entertain the Petitioner's claim that his appeal from an order of a District Court granting his Motion to Dismiss Indictment for Violation of the Speedy Trial Act Without Prejudice should not have been dismissed as interlocutory. A writ of certiorari is authorized sur 28 U.S. Code § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Petitioner has raised a claim under the Speedy Trial Act, 18 U.S. Code §3161 et seq. The District Court granted his pretrial motion to dismiss the indictment on the basis of the violation of this statute but refused to dismiss the indictment with prejudice. The Petitioner appealed to the United States Court of Appeals for the Third Circuit which dismissed the appeal as interlocutory. Therefore the Petitioner claims that he was denied his constitutional right to due process of law under the Fifth Amendment of the United States Constitution.

## STATEMENT OF THE CASE

On March 23, 2005, an Indictment was returned as to Petitioner Martin Kuper and codefendants Steven Rockman and Jeffrey Foster in the United States District Court for the Eastern District of Pennsylvania as per Criminal Docket No. 2:05-CR-00167-3. See Exhibit "A". The case was assigned to the Honorable Paul S. Diamond of the United States District Court for the Eastern District of Pennsylvania.

On April 6, 2005, counsel filed certain pretrial motions on behalf of the Petitioner. On the same day, Judge Diamond ordered that time in connection with these motions be excluded under the Speedy Trial Act until disposition.

On April 7, 2005, Judge Diamond scheduled the matter for a trial by jury on May 17, 2005. However, on April 18, 2005, Judge Diamond entered an Order granting a continuance under the Speedy Trial Act "ends of justice" provision, 18 U.S. Code §3161(h)(8)(A), in response to a motion for continuance filed on behalf of Defendant Rockman.

On June 12, 2006, the codefendant Foster entered a plea of guilty to these charges and became a cooperating witness for the Government. On February 6, 2007, codefendant Rockman also entered a guilty plea and became a cooperating witness for the Government.

On February 9, 2007, the District Court set a trial date of March 26, 2007 for the Petitioner. On March 6, 2007, the Petitioner filed a motion to dismiss the Indictment based on a violation of the Speedy Trial Act. Exhibit "B".

On March 13, 2007, the District Court entered an Order granting Petitioner's motion to dismiss the Indictment without prejudice. Exhibit "E". On March 27, 2007, a Notice of Appeal was filed on behalf of the Petitioner seeking review of that part of the District Court's Order that refused to dismiss the Indictment with prejudice. See Exhibit "F".

After submission of memoranda from the parties, the Court of Appeals entered its ruling in this case. See *United States v. Kuper*, 522 F. 3d 302 (3rd Cir. 2008). See Exhibit "G". The Opinion, dated April 7, 2008, was written by Judge Sloviter and was joined by Circuit Judges Fisher and Hardiman. On April 18, 2008, the Petitioner filed an Application for Rehearing En Banc, but the same was denied by Order of the Court dated May 5, 2008 . See Exhibit "I".

On July 10, 2008, the Government obtained a Superseding Indictment charging 16 counts of mail fraud and criminal forfeiture. The Petitioner has not yet been arraigned on this Indictment.

The Petitioner is now submitting a petition seeking a Writ of Certiorari from the Supreme Court of the United States.

## STATEMENT OF REASONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### THE INSTANT APPEAL SHOULD NOT HAVE BEEN DISMISSED AS INTERLOCUTORY BECAUSE THE COURT OF APPEALS FAILED TO GIVE PROPER WEIGHT TO PETITIONER'S CLAIM THAT DISMISSAL OF THE INDICTMENT WITHOUT PREJUDICE FALLS WITHIN THIS COURT'S COLLATERAL ORDER EXCEPTION TO THE FINAL JUDGMENT RULE

The Petitioner respectfully submits that the ruling of the Court of Appeals must be reversed as it fails to give significant weight to the factor of the public interest under the Speedy Trial Act, which should result in the allowance of the Petitioner's appeal.

The Third Circuit has ruled that the District Court's determination that the dismissal of the Petitioner's indictment without prejudice would not be appealable until and unless the Petitioner is reindicted, tried, convicted and sentenced, as such an Order is not final under 28 U.S. Code §1291. The Petitioner respectfully requests this Court grant review of this case for the compelling reasons discussed infra. Rule 10(c) of the Rules of this Court.

The Third Circuit has correctly noted that every Court of Appeals that has considered the appealability of an Order dismissing an indictment without prejudice under the Speedy Trial Act has held that such an Order is not final. However, the Petitioner respectfully observes that all of those decisions were issued prior to the decision of this Court in *Zedner v. United States*, 547 U.S. 49 (2006). The Petitioner argued before the Third Circuit that *Zedner* has given special emphasis to the policy consideration that the interests of the public in full, meaningful and consistent compliance with the Speedy Trial Act requires a degree of protection not previously accounted for in these circuit court decisions. See also *United States v. Bryant*, 523 F. 3d 349, 360 (D.C. Cir. 2008) and *Parisi v. United States*, 529 F. 3d 134, 140 (2nd Cir. 2008) (public interest in compliance with Act must be considered).

The Third Circuit stated that the Petitioner was not entitled to review of this issue (that the dismissal of the indictment should have been with prejudice) because the Petitioner could wait to appeal this ruling until he is reindicted and convicted, and that bearing the discomfiture and costs of a trial is "one of the painful obligations of citizenship", quoting this Court's decision in *Parr v. United States*, 311 U.S. 513, 519-520 (1956).

The notion that there is a level of acceptable pain is based upon language found in *Cobbledick v. United States*, 309 U.S. 323, 325 (1940), a case in-

volving an appeal of a denial of a motion of a trial witness to quash a subpoena. *Cobbledick* was decided prior to this Court's decision in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949), which enunciated the principle that a collateral order may be reviewed on appeal despite its interlocutory nature. See also *Abney v. United States*, 431 U.S. 561 (1977) (allowing an appeal of a pretrial order denying dismissal of an indictment on double jeopardy grounds).

Under the collateral order exception as summarized by this Court in *Coopers and Lybrand v. Livsay*, 437 U.S. 463 (1978), in order to escape the final order doctrine, the order sought to be appealed must conclusively determine the disputed question, resolve an issue which is completely separate from the merits of the action and be effectively unreviewable on appeal from a final judgment. As is discussed infra, this case should fall within this doctrine.

The key to an analysis under *Cohen* is whether the order of the District Court is sufficiently important that it should be treated as a final order. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). When a claim is "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated", the collateral order doctrine will accommodate an appeal. *Cohen*, supra at 546.

Like the petitioner in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) seeking appellate review of a claim of presidential immunity, this Petitioner seeks to vindicate his statutory right to a speedy trial. Thus this issue boils down to "a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement". *Digital Equipment*, supra at 878-879. Here, there is a need to ensure vindication not only of the Petitioner's rights but also of the public's interest in full enforcement of the Act. The Petitioner submits that his appeal seeks not only to avoid a trial that is not warranted but also to advance "a substantial public interest". *Coopers & Lybrand v. Livesay*, supra at 468.

This Court has recognized that there is an enormous advantage for the Government as it wields prosecutorial tools. *Abney*, supra at 661-662; *Wills v. Hallock*, 546 U.S. 345, 355 (2006). Unlike the order in the Wills case that was rejected for collateral review (involving a judgment bar under 28 U.S. Code §2676), the ruling in the instant case cries for an immediate appeal of right as a collateral order because a "compelling public end" is involved and this issue presents "a serious and unsettled question" that has not yet been resolved by this Court. *Cohen*, supra at 547; *Braxton v. United States*, 500 U.S. 344, 347 (1991).

In *Helstoski v. Meanor*, 442 U.S. 500 (1979), this Court held that a defendant could have appealed a

ruling denying his motion to dismiss an indictment on the grounds that the defendant, a former Congressman, could not be prosecuted in view of the Speech or Debate clause of the Constitution. The court held that the defendant could have secured review of that ruling by direct appeal and cited *Abney v. United States*, supra. Like a defendant with a double jeopardy claim, *Helstoski* was contesting the very authority of the Government to hale him into court to face trial on the charges against him. Id. at 507.

The Petitioner submits that this principle applies with equal force to the contention presented in the instant case as well. As this Court held in *Helstoski*, supra at 508, where even a part of the protection conferred by the Constitution (in that case, the speech or debate clause) would be irreparably lost if an appeal had to await the final judgment, the collateral order doctrine would apply to allow an appeal. In the instant case, the Petitioner's right to speedy trial and the public's interest in compliance with the Act need to be protected now.

In rejecting appealability, the Court of Appeals relied heavily upon this Court's ruling in *United States v. MacDonald*, 435 U.S. 850 (1978). In that case, the Court held that a District Court's Order which denied the defendant's pretrial motion to dismiss an indictment under the speedy trial rule was not appealable under the collateral order doctrine. In MacDonald, however, the Court was presented with

an appeal from an order which had denied a motion to dismiss an indictment on speedy trial grounds, not, as is the case here, an order which has granted such a motion. In the instant case, the issue that would be heard should an appeal be allowed is whether or not the District Court erred in its choice of remedy, to wit, that the indictment should have been dismissed with, and not without, prejudice. In a case where there has been a pretrial denial of a speedy trial claim, there has been no final rejection by the trial court of the defendant's contention until there has been a trial. Here, however, the question at stake in this motion (whether to dismiss with or without prejudice) is not open, unfinished or inconclusive. *Cohen*, supra at 546.

In *MacDonald*, supra at 860, this Court expressed its concern that the doctrine of finality in criminal cases would be undermined "if every pretrial order were appealable" in cases where a trial judge has denied a motion under the Sixth Amendment. The Court stated that "any defendant can make a pretrial motion for dismissal on speedy trial grounds and, if §1291 is not honored, could immediately appeal its denial." Id. at 862-863. This is surely a legitimate concern; however, it is not present in the instant case, where the Petitioner's motion was granted, not denied. The only issue which would be presented in this appeal, if it is allowed, would be that the District Court's Order dismissing the indictment on speedy trial grounds should have been

with prejudice, not without. Therefore allowing an appeal in the instant case would not offend the policy concerns expressed by this Court in *MacDonald*, supra.

Under *Zedner*, the ruling in *MacDonald* is also distinguishable because the Speedy Trial Act was adopted not only to protect the right of the defendant to a speedy trial but also to protect the right of society to be certain that criminal cases are promptly disposed of.

The Third Circuit has also relied upon language in *Parr v. United States*, 351 U.S. 513 (1956), which held that under the collateral order doctrine, a defendant may not appeal an order transferring a case from one district to another since that order was but a step towards final disposition of the merits of the case and was not a matter outside the stream of the main action. Clearly, that type of situation is distinguishable from the instant matter where a District Court has found that a defendant's right to a speedy trial has been violated but dismisses the indictment without prejudice. Such an issue is a clear example of a matter that is outside the stream of the main action and is not "but a step" towards final disposition of the merits of the case.

The Petitioner respectfully submits that an appeal at this time of an order granting a motion to dismiss based upon a Speedy Trial Act violation which refuses to dismiss the Indictment with prejudice can

be resolved by the current state of the record and would not (unlike a motion that was denied) be improved by waiting to see what happens at trial. Furthermore, this is not a claim which will be largely satisfied by waiting for trial and having the Petitioner acquitted, for more is at stake here than the Petitioner's anxiety.

The Petitioner respectfully disagrees with the lower court's ruling that he is not legally aggrieved or injured from having to await a new indictment, defend himself at a trial, suffer a conviction and receive a sentence before this issue can be heard on appeal. This Court has held that an accused's "anxiety and concern" are factors that are to be considered in determining if he has been prejudiced by reason of a pretrial delay. *Doggett v. United States*, 505 U.S. 647, 654 (1992); *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

The Petitioner concedes that if a trial judge dismisses an indictment with prejudice, a defendant cannot appeal since he would not be legally aggrieved according to the Third Circuit's interpretation of Parr; however, the Government could then appeal.

Therefore, although the Petitioner may not have a right to be free from reindictment or a second trial, there is no reason for him to undergo the "discomfiture and cost" of a full prosecution when the collat-

eral order doctrine should be available to consider this claim on appeal.

Under *Zedner*, there is a legitimate concern based upon the societal interest in insuring compliance with the Speedy Trial Act that the Act be fully and properly enforced by the District Court. In that decision, Justice Alito held that a defendant could not submit a prospective waiver of his Speedy Trial Act rights in view of the public interest in promoting compliance with the Act. Importantly, Justice Alito stated that the sanction of a dismissal with prejudice should be used where appropriate in order to provide "a powerful incentive" that the prosecution will monitor compliance with the Speedy Trial Act. 126 S. Ct. at 1984.

Because there exists the possibility of obtaining a dismissal with prejudice, a defendant has strong incentive to provide a vehicle, such as a motion to dismiss, to assure that there will be compliance with the Act. Id. at 1986-1987. With respect to remedy, the Supreme Court stated that, "the sanction for a violation of the Act is dismissal, but we leave it to the District Court to determine in the first instance whether a dismissal should be with or without prejudice". Id. at 1990. The plain truth is that a defendant will not have the same incentive to seek dismissal if he has to accept a new indictment and a trial before he can obtain final resolution of his contention that the first indictment should have been dismissed with prejudice.

In the present situation, if the appeal is allowed and the defendant is successful, then he would not have to go through a trial at all, thus sparing him substantial personal and financial hardship and allowing for a prompt and final resolution of an issue which early resolution thereof would benefit the public interest.

In his Dissenting Opinion in *United States v. Bratcher*, 833 F. 2d 69 (6th Cir. 1988), Judge Dowd stated that requiring the defendant "to run the gauntlet of a second indictment and trial" justifies a less strict application of the collateral order doctrine so as to avoid undermining the purposes and policies of the Speedy Trial Act. This is so because to fail to enforce the Act (i.e., to require the indictment to be dismissed with prejudice) will inevitably encourage the Government in its prosecution of criminal cases to feel less pressured to monitor compliance with the Speedy Trial Act. As noted by Judge Dowd in footnote 2 of his Dissenting Opinion, a District Court might adopt the practice of finding the dismissal to be "with prejudice" in order to force an appeal if the rule is that otherwise no appeal lies from this his decision. The Government would of course view a dismissal without prejudice as a "victory" and might feel less compelled to assure full compliance with the Act.

Therefore, this Court should grant this petition and hold that a defendant may challenge by way of an interlocutory appeal the decision of a District Court to dismiss an indictment without prejudice where the trial court has found that the statutory right of the defendant to a speedy trial has been violated.

## CONCLUSION

For all the reasons expressed herein, your Petitioner Martin Kuper respectfully prays this Honorable Court grant his petition and issue a Writ of Certiorari to review the ruling of the United States Court of Appeals for the Third Circuit in this case and then remand this matter to that Court for a resolution on the merits of the Petitioner's contention that the District Court abused its discretion by refusing to dismiss the indictment in this case with prejudice in view of the violation of the Petitioner's right to a prompt trial under the Speedy Trial Act.

Respectfully submitted,

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